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Supreme Court U. S.
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Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 78.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, PLAINTIFF IN ERROR,

vs.

ADA DAVEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF OF

THERON G. STRONG,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

THE ÆTNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
Plaintiff in Error,

AGAINST

ADA DAVEY.

In Error to the Circuit Court of the United States, for the District of New Jersey.

Brief of Theron G. Strong, Counsel for Plaintiff in Error.

The plaintiff below was the wife of William A. Davey. She brought this action to recover the amount of a policy of insurance upon his life. Her declaration alleged that on July 16, 1878, the defendant made and executed a policy of insurance, dated on that day, whereby, in consideration of the representations and declarations made to them in the application for the said policy, and of an annual premium, the defendant did insure the life of William A. Davey for the term of his natural life in the sum of $10,000, the said sum to be paid at the office of said company in Hartford, Conn., to his wife Ada Davey within ninety

days after *due notice and proof of the death of the said William A. Davey during the continuance of said policy.* It also alleged that the policy was issued and accepted upon certain conditions and agreements therein contained, the only one material being as follows:

"THIRD.—The said insured is under this policy freely permitted to reside in any settled portion of the western hemisphere lying north of the thirty-second parallel of north latitude at all seasons of the year and in the United States lying south of said thirty-second parallel, excepting from the 1st day of July to the 1st day of November; and in the eastern hemisphere lying north of the forty-second parallel of north latitude, and west of the fortieth meridian of longitude east from Greenwich at all seasons of the year, and in Italy south of said forty-second parallel, excepting from the 1st day of July to the 1st day of November; and he may also pass as a passenger by usual routes and means of public conveyance to and from any port or place within the foregoing limits, but if he shall at any time during the continuance of this policy pass beyond or be without the foregoing limits, or shall be personally engaged in blasting, mining or sub-marine operations, or in the manufacture or transportation of explosive substances, or as an employee in any capacity in service on any sea, river, lake, or other body of water, or upon any railroad, or if he shall enter into any military or naval service, whether voluntarily or otherwise (the militia when not in actual service alone excepted), without the consent of this company previously given in writing, signed by the President or Secretary, in each and every of the foregoing cases; or if he shall commit suicide, or die by his own hand, or in consequence of a duel, or in consequence of the violation of any law wherever he may be, *or if he shall become so far intemperate as to impair his health or induce delirium tremens,* or if his death shall result from injuries received while under the influence of alcoholic liquor, or if he shall be convicted of felony, then in each and every of the foregoing cases this policy shall become and be null and void, except as provided in the eighth section of these conditions."

The declaration then alleged a compliance with all the conditions of the policy, and in particular that he did not become so far intemperate as to impair his health or induce delirium tremens, contrary to the agreements and conditions contained in said policy.

It further alleged that the said Davey died during the continuance of said policy on the 6th day of August, 1881, and that due notice and proof of death was given to the defendant below on the 16th day of August, 1881.

The plea alleged two defenses:

1st. Untrue statements in the application.

2d. Breach of a condition subsequent, to wit: That if the said William A. Davey should become so far intemperate as to impair his health or induce delirium tremens, the said policy should become and be null and void. That the said Davey, after the issuing of the said policy, did become so far intemperate as greatly to impair his health and to induce delirium tremens, by reason whereof the said policy became null and void.

The plaintiff below, after proving the death of said insured on August 6th, 1881, offered in evidence certain papers, including physician's certificate of death, as constituting proofs of loss, claimed to have been served on the defendant below on the 16th of August, 1881, in compliance with and during the continuance of said policy, and said papers will be found on pages 90 to 96 of the Record.

By the physician's certificate (p. 95), which was a part of said proofs, the following questions and answers were made:

"3. Was his last illness occasioned or had his general health been impaired by any pernicious habits? He was in the habit of using stimulants and a great deal of tobacco —probably they impaired his health.

5 A. Was his health impaired by intemperance? A. See answer to 3. B. Was his death caused directly or indirectly from intemperance? B. See answer to 3."

The plaintiff below then rested.

The defendant below then called witnesses who testified substantially to the following facts:

From about the year 1870 the said Davey was accustomed during the summer season to go on a fishing excursion to Alexandria Bay, when for a period of two or three weeks he would be upon the St. Lawrence River nearly every day in company with a boatman, and it was his habit to drink about a quart bottle of brandy a day and also drink several times in the evening. (See testimony of Andrew Duclone, pages 10 and 12; William White, pages 34, 37.)

He was accustomed to purchase liquors from Gifford Benson at Vine Island, and frequently drank there to the extent of five or six times during an afternoon (pages 19 and 20), and at the hotel about three or four times during the evening (page 22).

During the last week in July, 1881 (page 53), the said Davey came to Alexandria Bay and stayed at the Crossman House. His boatman and guide was William White, who was with him during a period of about ten days (page 36). He invariably took a bottle of liquor with him in the boat each day, and some days would consume as much as a bottle of brandy (page 36). As soon as they started out in the morning they would proceed to Rockport, Canada, where a bottle of liquor would be purchased, and when the liquor was obtained they went out on the water (page 38), and six or seven drinks of raw brandy in a tumbler every ten hours was within the mark, and that was the course every day. The night before he was taken sick, Frederick Schuyler, a bell boy employed at the Crossman House, took to the said Davey's room two bottles of liquor, one of gin and the other of brandy. The next morning about half-past seven Schuyler found him very sick. He appeared to be out of his head, and complained that somebody was sawing his legs or arms off, and that the air was full of pitch and smoke (p. 24), and endeavored to show it to the witness around the room; and the two bottles which the witness had brought up were in the room empty.

Andrew Duclone was called to attend him, and was with him from about seven or eight o'clock in the morning until about one o'clock the following day, when Davey's

wife came. He also describes his condition which was one of extreme illness. He was crying out for liquor, and insisted upon having it. His condition is also described by the witness Bruce, who saw Davey the morning he was taken sick. He describes an acute attack which Davey underwent. He says his eyes wore a glassy staring look, and all at once he began to fasten them upon some point or object, and he commenced to clinch his fists and his whole frame seemed to become stiff and rigid, and he began to breathe very hard, and all at once he went into an unconscious state, and he thought he was dead. He held his limbs, and Dr. Watson, who was also in the room, held his arms. Gradually he recovered consciousness. At another time during the day he complained of putting on a pair of stockings that reached up above the knees, and of having a pair of boots on and wished witness to take them off, and on one occasion during his sickness complained of a great deal of pitch in the air. "He would look up in the air and look so (illustrating), and while I would be talking to him he would do so (illustrating), as if picking something from the bed and then snap his fingers on the floor. He also complained of the pitch and said there was a tube, a large heavy tube like a tin pipe to a furnace, and said it was lying on the bed and he wished me to take it off, and I told him I would help him and I went through the motion, and the minute I began to make the motion to lift it he sat up in bed and went through the same motion with me to help lift that off the bed" (pages 28–9).

The witness although not a physician at the time, had become and was at the time of the trial a practicing physician, and testified that he considered himself competent to speak upon the subject of delirium tremens from a medical stand point, and that in his opinion the said Davey was then when he saw him afflicted with delirium tremens, and that if the said Davey was in the habit of drinking liquor, as testified to by the witnesses, that its effect would be to impair his health.

Dr. Watson was in 1881 a practicing physician of long experience at Alexandria Bay, and attended said Davey. His testimony was in substance as follows: I went into

the room and found Mr. Davey sitting upon the side of the bed; he had just been vomiting, and had vomited quite a quantity of blood; he seemed very nervous and tremulous at the time, and told me that he had had fainting spells during the night; I asked him to show me his tongue, and it came out very tremblingly, and I noticed that he had bitten his tongue, and it was somewhat swollen. I became satisfied that the man had been having a spasm of some kind. He also told me that he had been suffering from a billious attack and had been taking pills; I asked him what kind of pills he had been taking; he said he did not know—some pills that he had gotten hold of somewhere, and occasionally he would spit out a mouth full of blood. The witness testified that it was blood not from his tongue but from his stomach; that the said Davey told him that he had been suffering from a deranged condition of the liver, and that his physician had told him he had cirrhosis of the liver, "and he told me he had been drinking during the night, and there was a bottle in the room empty, and I found that liquor had been freely used. After I remained with him a short time, he told me at that time that he had been cautioned by his family physician that unless he would stop drinking, or having his little times, as he worded it—or words to that effect—that might not be the language he put it in—he said his physician told him he was liable to these attacks if he persisted in drinking, and when he saw the blood he seemed quite alarmed. Then when I showed him the blood he had vomited, he said, "I suppose it is all up with me now." The witness then describes one of his spasms, and was then asked: "Q. What did you consider the exciting cause of that condition at that time? A. I looked upon the exciting cause as being too much stimulants. Q. What do you mean by stimulants? A. I mean too much alcoholic liquor." He then testified that the use of alcoholic liquor in the way he had been using it, and in the way the said Davey told him he had been using it, would have impaired his health.

On cross-examination he testified: "Q. Can you say, Doctor, certainly, what produced these spasms which he had? A. In my opinion, I should say that the liquor that he had taken was the exciting cause." He was further

asked on redirect: " Q. If you were called upon to give a designation or name to the disease Mr. Davey died of, what would you call it? A. I should think he died from the effects of the use of alcohol. Q. What name do you give that? A. Some call it delirium tremens * * * in my opinion it was."

The testimony of the witness Schuyler as to taking the bottles of liquor to the said Davey's room, and of finding him ill the next morning, and that of the witness Duclone who was with him from the first of his serious illness, of Bruce, who describes the conduct of said Davey during his sickness, of Dr. Watson, who attended him, and of the witness White who describes the extent to which the said Davey drank during the previous ten days while on his fishing excursion, is absolutely without any direct contradiction.

The defendant below claimed by this evidence in connection with the physician's certificate to have established a breach of the condition of the policy, "*or if he shall become so far intemperate as to impair his health or to induce delirium tremens, this policy shall be and become null and void*"

The defendant below then rested.

In rebuttal the plaintiff called Dr. Milne, and counsel for the defendant below raised the point that inasmuch as the plaintiff, by her own evidence, consisting of the physician's certificate, had established that his health was impaired by intemperance, it was an admission that his death was caused by the use of alcoholic liquor, and that she was bound by it. The Court ruled that the plaintiff below not only was not bound by it, but that the certificate *was not evidence of the facts stated in it*, to which ruling an exception was duly taken.

The plaintiff below then offered testimony by Dr. Milne and other witnesses, tending to prove that so far as their knowledge extended, the general course of life of the said Davey was sober and temperate, but except in this indirect manner there was no testimony whatever contradicting the statement of the witnesses of defendant below as to the use of alcoholic liquors by said Davey, and their effect upon him in the summer of 1881.

Dr. Milne, however, confirmed the claim of the defendant below as to the effect of the use of alcoholic liquors, as testified to by the witnesses for defendant below in the summer of 1881, in the following testimony: "Q. Assuming that he went away in that nervous state, and suppose that when he got to Alexandria Bay, the first day and every day for ten days, he went out alone on the river with a boatman, and with a bottle of brandy or gin, and drank six or seven times a day and drank again in the evening, and on the evening of the day before he was taken sick had two bottles, one of brandy and one of gin sent to his room, drank them up, and the next morning was found in the state described by Dr. Watson, and had indications of hemorrhage of the bowels, hœmatemissis to a large extent, and he himself declaring that he had cirrhosis of the liver, as his doctor had advised him, and died a few days afterward, would the drinking which I have described tend to impair his health? A. The drinking you have described would certainly impair the health of most mortals. Q. If a sick man, such as he was when he left you, spent the next ten days on the River St. Lawrence with a boatman and a bottle of gin and brandy, from which he drank seven times daily, and continued to drink at the hotel in the evening before he was taken sick, and on the evening before he was taken sick had two bottles sent to his room, one of brandy and one of gin, which were empty in the morning and drank by him, would that tend to impair his health and shorten his life? A. It would, materially, I should say" (pages 51–2).

Dr. Rae, by whom the physician's certificate introduced in evidence was made, testified as follows: "Q. You were asked was his illness occasioned or had his general health been impaired by any pernicious habit, and you replied he was in the habit of using stimulants and a great deal of tobacco, and probably they impaired his health; is that true now? A. Yes, sir; I say probably. Q. Would the use of stimulants as he described it to you and the use of stimulants in the summer, as I have stated, daily in the boat and in the evening after his return, and heavily the night before the beginning of his fatal illness, would that

kind of use of stimulants necessarily impair his health? A. Yes" (pages 68–9).

There was no attempt whatsoever by the witnesses for the plaintiff below to contradict, explain, or modify in the slightest degree the certificate of Dr. Rae, attending physician. On the contrary Dr. Rae himself testified that he adhered to the statements in the certificate.

The Court submitted to the jury the question whether the said Davey had become so far intemperate as to impair his health or induce delirium tremens, instructing them that the words "become so far intemperate as to impair his health," do not mean a single excess or indulgence in alcoholic liquor, "but there must be such frequency in their use continued for a longer or shorter period as indicates *an injurious addiction to such indulgence*," and that if the jury find that the illness of the said Davey at Alexandria Bay, in the summer of 1881, which resulted in his death, was caused either wholly or partially by the intemperate use of alcoholic liquor, in the sense as explained by the Court, to wit, such a "frequency in their use continued for a longer or shorter period as indicates an injurious addiction to such indulgence," the policy would then be void and not otherwise. The Court also instructed the jury that the physician's certificate offered by plaintiff below was not to be taken as evidence of the truth of the statements contained in it.

Under these instructions the jury found a verdict for the plaintiff below.

SPECIFICATION OF ERRORS.

FIRST.—The Court erred in instructing the jury in the words contained in brackets in the following portion of the charge: "Although as you have heard through the progress of this trial (the certificate is not to be taken as evidence of the truth of the facts stated here) it is proper to be taken into consideration by this company to whom it must be furnished for their consideration in ascertaining the truth touching the circumstances of the death of the insured. The following is the certificate:

State of New Jersey, County of Hudson:

WALTER RAE, of Jersey City, N. J., being duly sworn, deposes and says: That he is a regular physician by profession; that as such physician he attended Mr. William A. Davey, of Jersey City, N. J., in his last illness; that he was called upon to attend on or about the 4th day of August, 1881, and continued with him as such until the time of his death, viz., on the 6th day of August, A. D. 1881, and that the following answers to the proposed questions give all the facts relating to his last illness:

1. How long have you known the deceased? A. About three years.

2. What was the direct cause of death? B. Exhaustion from hæmatemesis.

2. What were the indirect causes of death? Exposure to the sun and cirrhosis of the liver.

3. Was his last illness occasioned, or had his general health been impaired by any pernicious habit? He was in the habit of using stimulants and a great deal of tobacco—probably they impaired his health.

4. A. Was his death occasioned by his own hand? A. No. B. By duelling? B. No. C. Or by the hands of justice? C. No.

5. A. Was his health impaired by intemperance? A. See answer to 3. B. Was his death caused directly or indirectly from intemperance? B. See answer to 3.

6. Was there a post mortem examination; if so, state the particulars? No.

7. Was any physician associated with you, or had any other physician been employed in the management of the case; if so, state who? Dr. Watson, Alexandria Bay, N. Y.

8. Was there anything remarkable developed by the history, progress or treatment of the case; if so, state the particulars in full? A. No.

SECOND.—The Court erred in deciding on pages 46 and 47 of the record that the physician's certificate was not evidence of the facts stated in it (see physician's certificate, *supra*).

THIRD.—The Court erred in refusing to charge the jury as prayed for in the ninth request, to wit, "the expression in the policy 'becomes so far intemperate as to impair his health,'" does not mean habitual intemperance; but an act of intemperance producing impairment of health is within the condition of the policy, and renders the policy null and void, except as therein provided.

FOURTH.—The Court erred in charging the jury as follows: "The words of the condition are to be expounded according to the common and popular acceptation of their meaning. In this sense of them a single excessive indulgence in alcoholic liquors is not intemperance; but there must be such frequency in their use, continued for a longer or shorter period, as indicates an injurious addiction to such indulgence."

FIFTH.—The Court erred in refusing to charge the jury as follows: "If the jury find that the illness of William A. Davey, at Alexandria Bay, in the summer of 1881, which resulted in his death, was occasioned by the use of alcoholic liquors, the policy was null and void, except as therein provided in the 8th section.

SIXTH.—The Court erred in refusing to charge the jury as follows: "If the jury find that the illness of William A. Davey, at Alexandria Bay, in the summer of 1881, which resulted in his death, was not occasioned wholly by the use of alcoholic liquors, but that the use of the same contributed to said illness, his health was impaired by said liquors, and the policy is null and void, except as provided in the 8th section.

SEVENTH.—That the Court erred in charging the jury in answer to the 10th and 11th requests, as follows: "These points are answered together. If the jury find the illness

of William A. Davey, at Alexandria Bay, in the summer of 1881, which resulted in his death, was caused either wholly or partially by the intemperate use of alcoholic liquors as explained in answer to the ninth prayer of the defendant, the policy was thereby avoided, except as therein provided in section 8.

EIGHTH.—That the Court erred in refusing to charge the jury, as follows: "If the jury find that the said William A. Davey drank alcoholic liquors at Alexandria Bay to the extent testified to by the witnesses for the defense, and the effect of the same was to impair his health in any degree, the policy is void except as provided in the 8th section.

NINTH.—That the Court erred in charging the jury, as follows: "The jury must consider the testimony on both sides touching the habits, course of life and condition of William A. Davey, at Alexandria Bay, and if they are satisfied that they became so far intemperate as before explained, and there indulged his injurious taste as to impair his health in any degree, the policy is void except as provided in the 8th section.

BRIEF OF THE ARGUMENT.

First.

The Court erred in ruling that the physician's certificate of death furnished to the company by the plaintiff below was not evidence of the facts stated in it, and in charging the jury that it was not to be taken as evidence of the truth of such facts.

I.—The insured died August 6, 1881 (p. 10).

The amount insured became payable according to the policy within 90 days *after due notice and proof*

of the death of the said insured *during the continuance of said policy* (p. 83). In conformity with this provision the plaintiff below, between August 11 and 13, 1881, caused certain papers constituting proof of death, including a physician's certificate of cause of death, to be prepared and verified, and on August 16th they were served on the defendant below (p. 10).

II.—It was incumbent upon the assured on furnishing such proof, not only to show the fact of death but death of the said insured *during the continuance of said policy*. By the terms of the policy it was to become null and void in case any of the conditions contained in the third paragraph of the policy should be violated, and hence it was the duty of the insured to furnish some proof as would afford reasonable assurance that the liability for loss existed.

Goldschmidt *vs.* The Mutual Life Insurance Company, 102 N. Y., 491.

Covenant Mutual Benefit Association *vs.* Hoffman, 110 Illinois, 603.

III.—As a part of such proof, and in particular to prove that the insured had not become "so far intemperate as to impair his health," a certificate of Dr. Walter Rae, who attended the assured in his last illness, was furnished. In that certificate is the following statement:

3. Was his last illness occasioned or had his general health been impaired by any pernicious habits? *He was in the habit of using stimulants* and a great deal of tobacco—*probably they impaired his health.*

5. Was his health impaired by intemperance? A. See answer to 3. B. Was his death caused directly or indirectly from intemperance? B. See answer to 3.

IV.—The defendant below claimed that this certificate established that the insured was in the habit of using alcoholic stimulants, and that they impaired his

health, and that the certificate having been furnished by the plaintiff below as a part of the proofs of death, and in conformity to the requirements of the policy, it was entitled to be used as evidence of the facts stated in it for the following reasons:

(*a.*) It was entitled to be used *as an admission of the plaintiff below.*

The papers constituting proofs of death were delivered to the company by the assured as a true account of the course of life, last sickness, death and interment of the insured. The certificate was intended to and did contain information on which defendant below could rely, and was intended to and doubtless did influence its action.

(*b.*) It was furnished *in accordance with the contract between the parties* requiring due notice and proof of death, and, as the contract itself provided for the termination of the policy upon the breach of certain conditions specified in it, the insured was entitled, upon a claim being made under the policy, to some proof that a liability for loss existed, and in particular that he had not become so far intemperate as to impair his health. (See sub-division II., *supra*, and cases cited.)

V.—In Insurance Company *vs.* Newton (22 Wallace, 32), where the company offered as evidence the preliminary proofs of the death of the party insured, and which the Court excluded, this Court, through Mr. Justice Field, said: "And independently of this position, the proofs presented were admissible as representations on the part of the party for whose benefit the policy was taken as to the death, and the manner of the death of the insured. They were presented to the company in compliance with the condition of the policy requiring notice and proof of the death of the insured as preliminary to the payment of the insurance. They were intended for the action of the com-

pany, and upon their truth the company had a right to rely."

VI.—In Connecticut Mutual Life Insurance *v.* Schwenck (94 U. S., 593), where a certificate was presented in connection with the proofs of death as to the age of the party insured, the Court, through Mr. Justice Strong, said: "In considering the ruling of the Court it has first to be observed that nothing in the policy required that proof of the death of the person whose life was insured should be accompanied by proofs of his age at the time of his death. There was, it is true, a memorandum endorsed on and folded in the policy that a certificate would be required from some intimate friend of the age of the person insured at the time of his death, but the memorandum was not part of the contract, and it was not shown to either the Court or jury by the counsel before the verdict was rendered. Nolan's affidavit, therefore, was not necessarily a part of the proofs of death, and hence it was immaterial, *yet having been furnished by the plaintiff to the defendant, it was some evidence of the age of the person insured,* though certainly not conclusive."

VII.—In Insurance Company *vs.* Higgenbotham, 95 U. S., 380, the doctrine of Insurance Company *v.* Newton, 22 Wallace, 32, was reaffirmed, and the following cases all sustain the position that the certificate was evidence:

New York Central Insurance Company *v.* Watson, 23 Michigan, 486.

Day *v.* Mutual Benefit Life Insurance Company, 1 MacArthur's Reports, D. C., 598.

Walther *v.* Mutual Life Insurance Company, California, 65 Cal., 417,

Connecticut Mutual Life Insurance Company *v.* Siegel, 9 Bush, 452.

VIII.—In some cases the claim has been made and sustained that statements in proofs of loss furnished by

the insured, showing a violation of the policy, are not only evidence but amount to an estoppel.

Insurance Company *vs.* Newton, 22 Wallace, 32.

Campbell *vs.* Charter Oak Insurance Company, 10 Allen, 213.

Irving *vs.* Excelsior Insurance Company, 1 Bosworth, 507.

The New York Central Insurance Company *v.* Watson, 23 Michigan, 486.

In order to avoid the force of an estoppel it is sometimes held that such statements are open to explanation and correction. But it is to be remembered in the present case that the statements in the certificate were not sought to be explained or corrected in any respect. On the contrary, Dr. Rae, who made it, was a witness for the plaintiff below, and testified that he adhered to the statement contained in it.

IX.—It is, however, unnecessary to claim an estoppel because the certificate was denied any effect whatever —not even as *prima facie* evidence. Clearly, it was evidence, and as such it bore directly upon the main issue, to wit, whether the insured had become "so far intemperate as to impair his health." It tended strongly to prove an impairment of health as the result of intemperance. Therefore, in instructing the jury that it was not to be taken as evidence of the facts stated in it, the Court withdrew from the jury material evidence tending to establish impairment of health by intemperance, and a consequent breach of one of the conditions of the policy. The error was clearly prejudicial to the defendant below. It is, however, for the plaintiff below to show the Court affirmatively that the error was not harmful.

Deery *v.* Cray, 5 Wall, 807.

Smith *v.* Shoemaker, 17 Wall., 630.

Moore *v.* Bank, 104 U. S., 625.

Gilman *v.* Higley, 110 U. S., 50.

Second.

The Court erred in refusing to charge each of the following propositions, and in its instructions to the jury in reply thereto.

I.—The ninth prayer of instructions is as follows: "The expression in the policy, 'become so far intemperate as to impair his health,' does not mean habitual intemperance, but an act of intemperance producing impairment of health is within the condition of the policy and renders the policy null and void, except as therein provided."

The instruction in reply was as follows: "This instruction is refused. The words of the condition are to be expounded according to the common and popular acceptation of their meaning. In this sense of them a single excessive indulgence in alcoholic liquors is not intemperence, *but there must be such frequency in their use continued for a longer or shorter period as indicates an injurious addiction to such indulgence.*"

The tenth and eleventh prayers are as follows:

"10. If the jury find that the illness of William A. Davey, at Alexandria Bay, in the summer of 1881, which resulted in his death, was occasioned by the use of alcoholic liquors, the policy was null and void, except as therein provided in the eighth section."

"11. If the jury find that the illness of William A. Davey, at Alexandria Bay, in the summer of 1881, which resulted in his death, was not occasioned wholly by the use of alcoholic liquors, but that the use of the same contributed to said illness, his health was impaired by said liquors, and the policy is null and void, except as provided in the eighth section."

The following instruction was given in reply: "If the jury find that the illness of William A. Davey, at Alexandria Bay, in the summer of 1881, which resulted in his death, was caused either wholly or partially by the intemperate use of alcoholic liquors, as

explained in answer to the ninth prayer of the defendant, the policy was thereby avoided, except as therein provided in the 8th section."

The twelfth prayer is as follows:

"12. If the jury find that the said William A. Davey drank alcoholic liquors, at Alexandria Bay, to the extent testified to by the witnesses for the defense, and the effect of the same was to impair his health in any degree, the policy is void, except as provided in the 8th section."

The following instruction was given in reply: "The jury must consider the testimony on both sides touching the habits, course of life, and condition of W. A. Davey, at Alexandria Bay, and if they are satisfied that they became so far intemperate as before explained, and then indulged his injurious taste as to impair his health in any degree, the policy is void, except as provided in the 8th section.

II.—The above prayers and the instructions given in reply were all based on that part of paragraph "Third" of the policy which reads as follows: "Or if shall become so far intemperate as to impair his health or induce delirium tremens * * * this policy shall become and be null and void, except as provided in the 8th section of these conditions."

III.—The several prayers for instructions were made in view of the evidence detailed in the statement of facts which established, according to the witnesses for the plaintiff below in rebuttal, that the said Davey drank alcoholic liquors with considerable frequency, at least, as an ordinary practice; and, according to the witnesses for the defendant below, that the said Davey for several years, while sojourning at Alexandria Bay, used them excessively and immoderately, often consuming as much as a quart bottle of brandy in a single day, besides drinking several times in the course of the evening; that in 1881, for about ten days, he used alcoholic liquor excessively, consuming on some days as much as a quart of brandy, besides

drinking in the evening, and never less than six or seven times during the day, besides drinking in the evening; that the day before he was taken sick he ordered, and there was taken to his room, two quart bottles of liquor, which he consumed during the night, and was found next morning suffering from mortal illness, the result of the use of alcoholic liquors, and was in a condition of delirium tremens, which sickness terminated August 6th in his death.

The facts respecting his use of liquor in 1881 while on the river; taking the two bottles of liquor to his room, and consuming them; his illness and the cause of it; and the medical opinions as to the effect upon him of using liquor to that extent was established by the uncontradicted testimony of White (p. 34), and Schuyler (p. 22), and Drs. Watson (p. 39), Bruce (p. 26), Rae (p. 64) and Milne (p. 46).

IV.—The defendant below, therefore, contended that this testimony, if believed, established that the said Davey was "so far intemperate as to impair his health," and that the Court erred in instructing the jury that to establish that the insured was "so far intemperate as to impair his health," there must be "such frequency in their use (*i. e.*, the use of alcoholic liquors), continued for a longer or shorter period *as indicates an injurious addiction* to such indulgence." The question, then, is whether to establish a breach of said condition it is necessary to prove intemperance amounting to "*injurious addiction.*"

V.—"Injurious addiction," in its ordinary acceptation means "injurious habit." The words "addict" and "addiction" are defined by lexicographers to mean "to apply habitually, to habituate, habit, state of being devoted."—Webster's Unabridged Dictionary and Worcester's Unabridged Dictionary. It is therefore evident that the language used in defining the words "so far intemperate as to impair health, &c." was calculated to and did convey to the jury that the

quantum of intemperance required to establish a breach of the condition must amount to an "injurious addiction" or habit, and that no intemperance short of "injurious addiction" would defeat the policy.

VI.—In other words, the Court in effect ruled that notwithstanding the jury should find it satisfactorily established that the insured had impaired his health or induced delirium tremens by the intemperate use of alcoholic liquors, it was no defense unless the jury should also find that such intemperate use had been so frequent and continuous as to indicate an "injurious addiction." It follows, therefore, that if intemperance *in any degree* less than an "injurious addiction" may impair health or induce delirium tremens, as it undoubtedly may, the instruction of the Court was erroneous.

VII.—There are several impregnable grounds for claiming that a less degree of intemperance than injurious addiction or habit is sufficient.

(*a.*) The language of the policy itself: "*or if he shall become so far intemperate as to impair his health or induce delirium tremens.*" This language relates exclusively to a condition of things existing subsequent to issuing the policy. The interrogatories in the application refer to the past and present; the condition above quoted relates to the *future* and is an agreement that if the insured impairs his health or induces delirium tremens by intemperance, the policy shall be null and void. Nothing whatever is said here or elsewhere in the policy relating to this condition indicating that an "injurious addiction" or "habit" was contemplated by the expression "so far intemperate." No such idea is expressed and must rest in implication if it exists. If it had been contemplated it is fair to presume that it would have found expression. Nothing would have been easier than to say "so far *habitually* intemperate," or "so far injuriously addicted to the use of alco-

holic liquors." The degree of intemperance would then have been habitual intemperance or injurious addiction. As the language stands another and less degree is presented, to wit, *any* intemperance, habitual or exceptional, which impairs the health or induces delirium tremens.

Unless it is impossible that an individual should be so far intemperate as to impair health or induce *delirium tremens*, without being *habitually* intemperate or *injuriously addicted* to the use of alcoholic liquor, the instructions of the Court in explaining the words of the condition are clearly erroneous. That it is not only possible in fact, but that instances might be multiplied to any extent demonstrating the possibility that individuals may and do become so far intemperate, as to impair health or induce delirium tremens, without having contracted the habit of or being injuriously addicted (*i. e.*, habituated) to the use of alcoholic liquors, is undeniable.

In Insurance Company *vs.* Foley (105 U. S., 350), the Court, by Mr. Justice Field, said: "An attack of delirium tremens may sometimes follow a single excessive indulgence. Rae, in his treatise on medical jurisprudence, says, that though it most commonly occurs in habitual drunkards, after a few days of abstinence from spirituous liquors, it may be the immediate effect of an excess or series of excesses in those not habitually intemperate as well as those who are (Sec. 545). In the American Cyclopedia, under the head of "Delirium Tremens," it is stated that it "sometimes makes its appearance in consequence of a single debauch," though commonly it is the result of protracted or long continued intemperance" (Volume V., p. 782). In the absence, therefore, of anything in the *language* of the policy, expressing or implying a habit or injurious addiction as necessary in construing, according to their ordinary acceptation, the words "so far intemperate," the Court erred in introducing "injurious

addiction" or habit as an essential element of the intemperance referred to.

(*b.*) A second ground is that the true test of the condition, "so far intemperate as to impair his health," is not, as the Court ruled, whether the intemperance amounted to an "injurious addiction," but whether there was an *impairment of health*, and, if so, was intemperance in any degree the cause. *Any* degree of intemperance, whatever, habitual or exceptional, not impairing the health or producing delirium tremens would not have rendered the insured so far intemperate as to impair his health or induce delirium tremens, within the meaning of the policy.

Mutual Life Insurance Company *vs.* Rohkopp, 94 Penn. St., 59.

The only intemperance aimed at by the condition was such as to "impair his health or induce delirium tremens." The condition is designed to prevent impairment of health or inducing delirium tremens by intemperance.

The Court, instead of making impairment of health or inducing delirium tremens the test, pointed out another and different test, viz.: Assuming the jury find that his health was impaired by the intemperate use of alcoholic liquors, did such intemperate use of alcoholic liquors consist in "such frequency in their use continued for a longer or shorter period as indicates an injurious addiction to such indulgence."

The test furnished by the Court relates to intemperance as a habit or "injurious addiction." Its effect was to mislead the jury into supposing that even though they should find that his health was impaired, or delirium tremens induced by intemperance, this constituted no defense unless they should also find that such intemperance was established by proof of such frequency and continuity in the use of alcoholic liquors as indicated an injurious addiction, *i. e.*, habit.

It conveyed to the minds of the jury the idea that

unless, in addition to proof of impairment of health by intemperance, it was established that such intemperance amounted to an "injurious addiction," resulting from frequent and continuous use, no amount of impairment of health, nor even delirium tremens produced by any less degree of intemperance, would invalidate the policy.

This test was manifestly erroneous. The impairment of health and delirium tremens aimed at is that produced by intemperance *in any degree*. It may be the drunken debauch of a comparatively sober and temperate individual, or the habitual use or injurious addiction of a confirmed tippler. The individual may have descended from a course of total abstinence into excess from disappointment, disaster, affliction or any other cause, or by degrees have contracted a *habit* of intemperance, but the only inquiry is, did such intemperance impair his health or induce delirium tremens? If so, the policy is void. By that test alone can the language of the policy be satisfied.

As delirium tremens may be induced by a single excessive indulgence, without a habit or injurious addiction having been contracted, the policy is avoided by it just as much as by *habitual* indulgence. The use of alcoholic liquors to the extent of impairing health is an intemperate use, but the Court ruled that an intemperate use to the extent even of producing illness, resulting in death, did not avoid the policy, unless such intemperate use was established by proof of such frequency in the use of alcoholic liquors continued for a longer or shorter period as indicates an injurious addiction to such indulgence. Therefore when the Court instructed the jury that the intemperance by which his health was impaired or delirium tremens induced meant an "injurious addiction to such indulgence," the test by which the degree of intemperance was to be determined was not only erroneous but the true test, viz.: was his health impaired or delirium tremens induced

by the intemperate use of alcoholic liquors was discarded."

(*c.*) The third ground is that the language of the condition furnishes a plain and unmistakable guide as to the degree of intemperance invalidating the policy, namely, *so far* intemperate as to impair health.

The third paragraph of the policy in which the language is found is especially directed in all its parts to prevent increase of risk by diminution of the chances of life. First, it guards against impairment of health by climatic influences. Second, it guards against hazard to life by engaging in hazardous occupations. Third, it guards against destruction of life by suicide, duel or violation of laws. Fourth, it guards against impairment of health by imprisonment—conviction of felony. Fifth, it guards against the same by intemperance.

Impairment of health is the objective point and intemperance the cause. Just as passing beyond the limits specified, or engaging in the occupations named without the consent of the company avoids the policy, so if by intemperance health is impaired or delirium tremens is induced the policy is null and void.

The *degree* of intemperance may vary with the individual, but the point at which intemperance *in any degree* avoids the policy is when the individual is *so far intemperate* as to impair his health. The fair inquiry is, has he reached that degree of intemperance which impairs his health? It may or may not amount to habit or injurious addiction, but if that degree which impairs health has been reached, the insured has become *so far intemperate* as to impair his health and the policy is void.

VIII.—Certain concessions may help to put the point we seek to make in a clear light.

If we say that a man *is intemperate* we are doubt-

less understood according to the ordinary acceptation of the language used to be describing a characteristic of the man If what we say is true, the person described has become addicted or habituated to the excessive use of alcoholic beverages; a single or very rare excess, no matter how gross, would not give him that trait of character. Hence, if the condition of this policy had been, without qualification, "*if he shall become intemperate,*" proof of *habit* would have been needed to make out a breach of the condition, and the charge of the Court below in response to the defendant's 9th request (p. 75) would have been unexceptionable.

So also if the policy had read "if he shall become intemperate and *thereby* his health is impaired or delirium tremens is induced" the charge would have been correct. The jury must have been satisfied of two things (1) that the insured had become intemperate, *i. e.*, habituated or addicted to the excessive use of alcoholic beverages, and (2) that such habit or addiction had caused the particular result mentioned.

But a single debauch, such as on the evidence, Davey indulged in at Alexandria Bay just before his death, is certainly an *intemperate* act. It is a distinct step towards the formation of the habit of excess which characterizes the individual as *intemperate.* Therefore, if such a debauch, as in Davey's case, induces delirium tremens or impairs health, the person who has been guilty of it may be aptly described as having become *so far* intemperate as to impair his health or induce delirium tremens. Hence we say the condition of this policy is not limited to the case of a habit or injurious addiction producing impairment of health or delirium tremens, but covers any intemperate act producing that result.

IX.—The evidence, if believed by the jury, might or might not in their judgment make out a case of injurious addiction, but might in either of two aspects have established a breach of the condition "become so far intemperate as to impair his health or induce delirium tremens."

(*a.*) As establishing *an act of intemperance*, impairing his health or inducing delirium tremens (see 9th prayer).

Consuming two quart bottles of liquor in a single night, resulting in a condition of sickness and delirium tremens, as testified to by Drs. Watson and Bruce, terminating in death, present a case of a single act of intemperance or a drunken debauch, impairing his health and inducing delirium tremens.

(*b.*) As establishing a practice not necessarily habitual, but *so far* intemperate as to impair health (see 10th and 11th requests, and instruction of Court in reply). Known to his friends as customarily drinking liquor; drinking it in large quantities at Alexandria Bay for several years; finally, in 1881, consuming, for a period of ten days, on some days as much as a quart of liquor in addition to other drinking, and on every day at least six or seven drinks in addition to what he drank in the evening, followed by consuming two quart bottles of liquor in a single night; his illness resulting therefrom and his subsequent death, as already detailed, established a use justifying the finding that, if not habitually intemperate, he had become *so far intemperate* as to impair his health.

We therefore contend:

1. That it was not necessary, in order to prove the insured had "become so far intemperate as to impair his health," that it should be established that he was "injuriously addicted" or habituated to the use of alcoholic liquors.

2. That proof of intemperance, *in any degree*, resulting in impairment of health or delirium tremens, established that he was *so far* intemperate as to impair his health or induce delirium tremens.

3. That it is not only possible, but a fact, that a degree of intemperance, not amounting to injurious addiction, often produces impairment of health or delirium tremens.

4. That therefore the Court erred in instructing the jury that the degree of intemperance referred to in the policy was an injurious addiction.

5. That consequently the jury were misled into supposing that, notwithstanding they should find that the intemperate use of alcoholic liquors produced impaired health and delirium tremens, it was no defense unless such intemperate use amounted to an injurious addiction.

X.—There is no case deciding the question here presented, to wit., whether the words, "*so far intemperate*," are satisfied by no degree of intemperance less than an "injurious addiction" or habit. All of the cases of any authority turn mainly upon two questions: 1st, What constitutes habitual intemperance? and, 2d, Whether the words "sober and temperate habits" refer to habitual intemperance? There is a wide difference between the questions presented in these cases and that in the case at bar.

XI.—In N. W. Ins. Co. v Muskegon Bank (122 U. S., 501), there were two separate pleas or defenses: 1st, That the insured was *habitunlly* intemperate prior to and at the time of issuing the policy. 2d. That after the issuing of the policy the insured became *habitually* intemperate, and so far intemperate as to impair his health and induce delirium tremens, and that thereby the said policy became and is null and void. The opinion (page 503) states: "The issues were tried upon two allegations of *habitual intemperance* before and after the issue of the policy." Again, at page 505 the opinion states: "The questions which the jury had to respond to were whether Comstock was of intemperate habits at the time the policy was taken

out, and whether he became habitually intemperate after that period. The whole case depended so far as the jury was concerned upon the true definitions of the words "habitually intemperate," taken in connection with the testimony on the subject at these two different periods. The plaintiff was not bound to prove that the assured was temperate, or that he was a temperate man; but the defendant was bound to prove, not only that Comstock was intemperate at those periods, but that he was "habitually so."

From the report it is apparent that defendant's counsel made no attempt to obtain a construction of the condition which should cover anything else than "*habitual* intemperance." His exceptions assumed that the jury must be satisfied that the insured was *habitually* intemperate, and directed the attention of this Court merely to the question of what constitutes *habitual* intemperance. Moreover, the condition of the policy differs from that in the present case in not restricting the meaning of the word "intemperate" by the use of any qualifying phrase, leaving it open to mean "*habitually* intemperate." The language of the policy in the present case, "so far intemperate as to impair his health," &c., eliminates the element of habit from the signification of the word "intemperate." To be within the condition, it is unnecessary to be habitually intemperate, but only *so far* intemperate as to impair health.

Third.

The judgment should be reversed, and a new trial ordered.

THERON G. STRONG,
Of Counsel for Plaintiff in Error.

[N 8841]

United States Supreme Court

THE ÆTNA LIFE INSURANCE COMPANY of Hartford, Connecticut,

Plaintiff in Error,

versus

ADA DAVEY,

Defendant in Error.

BRIEF OF JOHN LINN,

Counsel of Deft. in Error.

JERSEY CITY:
J. J. Griffiths, Law Printer, 38 Montgomery St.
1887.

J. J. Griffiths, Printer, 38 Montgomery St., Jersey City.

United States Supreme Court

The Ætna Life Insurance Company
of Hartford, Connecticut,
Plff. in Error,

vs

Ada Davey,
Deft. in Error.

Brief of John Linn, Counsel of Defendant in Error.

The questions presented for the consideration of this Court are purely questions of law.

The verdict of the jury settled the facts, upon the evidence submitted to them, and the Court who listened to all of that evidence have refused to disturb the verdict, approving, or at least not disapproving, of the conclusions at which the jury had arrived.

It remains therefore, only for this Court to determine whether the Court below has committed any error in matter of law which entitles the defendant company to a reversal of the judgment which has been rendered against it.

The assignments of error cover all of the exceptions taken by the defendant to the ruling of the Court on the trial of the cause, and go even beyond this. The fifteenth and sixteenth assignments (page 82 of the record) are based upon the findings of the jury and not upon the ruling of the Court. Even if true as therein stated this Court cannot and will not give them any consideration.

I proceed, therefore to present my views of the questions raised by the exceptions taken to the ruling of the Court, in the order in which they were raised upon the trial of the cause.

I.

The first and fourth exceptions relate to one subject only, and give rise to but one question for the consideration of this Court. They may, therefore, be considered together.

In order to understand the grounds upon which they rest, and the weight to be attached to them, if any, it is important to consider for a moment the facts surrounding them, and out of which they arise.

The plaintiff on the trial had introduced the proof necessary to entitle her to a recovery, and had rested her case. With the evidence thus offered was the physician's certificate and affidavit of death. This was one of the requirements of the company before the claim could be paid. It was made according to the form prescribed and furnished by the company. As a part of it, the physician was required to answer certain questions. One question was: "What was the direct cause of his death?" To this he answered: "Exhaustion from hœmatemissis." Another question was, "What were the indirect causes of death?" To this he answered: "Exposure to the sun and cirrhosis of the liver." And another question was: "Was his last illness occasioned, or had his general health been impaired, by any pernicious habits?" His answer to this was, "He was in the habit of using stimulants and a great deal of tobacco."

The defendant then, after the plainfiff had rested, in support of its defence, introduced, with other testimony, evidence for the purpose of proving that the

deceased had been in the habit of the excessive use of alcoholic liquors.

After the defendant had concluded its testimony the plaintiff in rebuttal offered to prove that the deceased never was in the habit of using alcoholic liquors to excess.

The plaintiff objected to any proof on this subject. It was insisted that the certificate of the physician was conclusive upon this point against the plaintiff. The physician having said that the deceased was in the habit of using stimulants and a great deal of tobacco, the defendant maintained that this statement could not be contradicted, nor any further testimony given by the plaintiff on this subject. What was said by Court and counsel on this question appears on pages 46 and 47 of the record.

It is as follows :

"Plaintiff's counsel then opened for the plaintiff in rebuttal and called as a witness on the part of the plaintiff in rebuttal—

Dr. JAMES A. MILNE, who, being duly sworn according to law, testified as follows :

Direct examination by Mr. LINN :

Mr. KEASBY. Do you propose to prove by this witness the facts you have stated—that he was not in the habit of using alcoholic liquors ?

Mr. LINN. I do, so far as he is concerned.

Mr. KEASBY. I object to any proof on this subject, and it will apply to all the testimony of this nature. The condition of this policy was that before the policy was issued he had not been in the habit of using alcoholic stimulants often or daily.

The COURT. Excessively. You do not mean to say that this company does not mean to pay if a man takes a drink occasionally ?

Mr. KEASBY. I am not touching upon that point. The condition of the policy was that it should be

void if he was in the habit of using stimulants so as to impair his health. When he comes to die it is the habit of the company in all cases to put to the physician of the party certain questions, which are directed to—find out from the source best qualified to know—from the physician of the party insured, or his friends—what is the fact as to that condition, whether it has been fulfilled or not, and therefore they ask these three questions: "Was his last illness occasioned, or had his general health been impaired, by any pernicious habit?" "Was his health impaired by intemperance or his death caused, directly or indirectly, from intemperance?"

Now, it is perfectly plain that if in answer to these inquiries the friends of the insured procured their family physician to assert the affirmative to all those questions, the case is ended, and they cannot get their money. It is an admission that his death was caused by the use of alcoholic liquor.

The COURT. I do not regard that as evidence of the fact stated, but simply a fulfillment of the requirement of the company.

Mr. KEASBY. Then, if the physician to whom they applied assert that his death was caused by intemperance?

The COURT. I have held that that is not evidence of the fact stated there, but shows that the party insured has complied with the requirement of the company; that is all. It is not independent evidence of the facts stated in the certificate.

Mr. KEASBY. Would your honors hold that where a party presents that certificate as proof of loss it is not evidence of the facts as against them?

The COURT. No, sir; the mere declaration of the doctor, made in pursuance of the company's requirement, is not evidence. In other words, there must be proof of loss, and that must be shown by the insured, and the execution of this paper is merely to show that the contract, so far as that is concerned, is complied with.

Mr. KEASBY. Would it be held, then, that if the plaintiff has presented his own physician's certificate asserting that the man died of cirrhosis of the liver, we are not entitled to assume that the man died of that disease, but we must prove it.

The COURT. Yes, sir; it is a requirement of the company, and if it were to be permitted to be used as evidence, you would have the evidence of the physician without the right of cross examination. You may note an exception, if you wish.

To which ruling and decision of the Court defendant's counsel pray an exception, which is allowed by the Court and sealed accordingly.

JOHN T. NIXON, J. [L. S.]

The Court then charged the jury upon the same subject in manner following: (Page 73 of the record.) "Although as you have heard through the progress of this trial, this certificate is not to be taken as evidence of the truth of the fact stated here, it is proper to be taken into consideration by this company, to whom it must be furnished for their consideration in ascertaining the truth touching the circumstances of the death of the insured, and here is a suggestion which is certainly entitled to weight, in so far as it may afford a full and complete justification of the course this company has taken in making inquiry as to the cause of death and in insisting that its liability, in view of the information gathered, shall be determined by the proper tribunal."

The second exception then upon this subject was taken as follows: (Page 78 of the record.) "And the said defendant then and there also excepted to the words in brackets in that part of the charge of the Court as is in these words, to wit:

"Although as you have heard through the progress of this trial (this certificate is not to be taken as evidence of the truth of the fact stated here), it is proper to be taken into consideration by this com-

pany, to whom it must be furnished for their consideration in ascertaining the truth touching the circumstances of the death of the insured."

And said defendant prayed that his said exception may be sealed, and it is sealed accordingly.

JOHN T. NIXON, J. [L. S.]

Upon these two exceptions the first, second and fifth assignments of error were made in the following manner: (Page 80 and 81 of the record.)

"I. That the Court erred in deciding, at folios 207-214, that the certificate of death furnished to the plaintiff in error by the defendant in error, was not evidence of the facts stated therein, and that, notwithstanding the introduction of the same in evidence by the defendant in error it was not conclusive, but subject to be contradicted by the defendant in error.

II. That the Court erred in allowing the witness, James A. Milne, to answer the following question, put to him by the counsel for the defendant in error:

"What were his habits as to the use of intoxicating liquors so far as they came to your knowledge and observation?"

The Court erred in admitting this question, as it is in contradiction of the physician's certificate, and the defendant in error cannot contradict that. (Fols. 217-218.)

V. That the Court erred in charging the jury that "this certificate of death is not to be taken as evidence of the truth of the fact stated here." (Fol. 353.)"

Now, we ask why should any statement made by a physician, friendly or unfriendly, who happens to be called to the bedside of a dying man whose life has been insured, as to the cause of his death or the

habits of his life, be conclusive against the world as to the facts therein represented?

But the counsel may say it is not conclusive against the world, only against the party procuring him to make the certificate.

The party, however, does this simply in obedience to the requirements of the company. And the answer given by the Court to the objection is a complete refutation of its reasonableness or soundness.

Besides, if instead of simply making the certificate this physician had been called by the plaintiff as a witness, and had testified in the most positive terms that the deceased had been addicted to the excessive use of alcoholic stimulants, and had died of *delirium tremens*, his testimony would not have been conclusive upon the party calling him. He might have been contradicted by other witnesses in as strong terms as he himself had testified. A party is always at liberty to contradict his own witness. He cannot attack his character for truth, but he is at liberty to contradict his statements *ad libitum*.

1 Wharton on Evidence, Sec. 549.
1 Greenleaf on Evidence, Sec. 443.

It was very clear that the Court put this whole matter fairly and correctly before the jury. They held that the certificate of the physician was not conclusive, that the plaintiff had a right to offer other testimony for the purpose of showing that it was not strictly correct, but left the statement made by the physician, with the other testimony in the cause upon the same subject, for the consideration of the jury in making up their verdict.

II.

The second and third exceptions may be considered together, and are found on pages 77 and 78 of the printed record.

They relate to the charge of the Court.

That part of the charge which gave rise to them is found on page 72 of the printed case.

It is as follows: "It is alleged in the first place by the defendant that an answer of William A. Davey to a question found in this application was untrue, and therefore, by the express terms of the contract, it was absolved from any liability to pay anything on this policy. That question is as follows: "Has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, or does he use any of them often or daily? The answer to that is, "No," which imparted the information that he had never been addicted to the excessive use of any alcoholic liquor or opium, and that he did not then, at the time of the answering of this question, habitually use any of them, often or daily.

"You will observe, gentlemen of the jury, that this relates to the condition of things existing at the time of the execution or signing of this application, July 16th, 1878. It relates to the habits and course of life of William A. Davey at that time. He is bound by his contract to make a truthful answer to that question, and if it is in any sense untrue, the contract between him and the insurance company was void, and cannot be the basis of any claim for the amount stated in the policy. You will consider the evidence which has been produced here by the defendant to support the allegation made that the answer is untrue. I do not intend to advert to it in detail, or more than in the most general way, but simply to say to you that you must be satisfied from the evidence produced by the defendant before you (because the burden is upon the defendant) that at the time when this question was answered by Mr. Davey he either had been addicted to the excessive or intemperate use of alcoholic stimulants or opium, or that he was at that time in the habit of the frequent or daily use of it. If you are so satisfied, why then

the answer was untrue, the contract void, and the plaintiff is not entitled to recover the amount of this policy."

The two exceptions founded upon this part of the charge are as follows (page 77 and 78 of the record):

"Thereupon the defendant then and there prayed an exception to the word in brackets in that part of the charge of the Court as is in these words, to wit:

"The answer to that is 'No,' which imparted the information that he had never been addicted to the excessive use of any alcoholic liquor or opium, and that he did not then, at the time of the answering of this question (habitually), use any of them often or daily."

And said defendant prayed that his said exception may be sealed, and it is sealed accordingly.

JNO. T. NIXON, J. [L. S.]

And the said defendant also then and there excepted to the words in brackets in that part of the said charge of the Court as is in these words, to wit:

"I do not intend to advert to it in detail, or more than the most general way, but simply to say to you that you must be satisfied from the evidence produced by the defendant before you (because the burden is upon the defendant) that at the time when this question was answered by Mr. Davey he either had been addicted to the excessive or intemperate use of alcoholic stimulants or opium, (or that he was at that time in the habit of the frequent or daily use of it.)"

And said defendant prayed that his said exception may be sealed, and it is sealed accordingly.

JNO. T. NIXON, J. [L. S.]

The assignments of error arising from this part of the charge of the Court are in the following language (page 81 of the printed record):

III. "That the Court erred in charging the jury that the answer 'No' to the question 'Has the party ever been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, or does he use any of them often or daily?" imparted the information that he did not then—at the time of the answering of this question—habitually use any of them often or daily.

The Court erred in making use of the word "habitually." (Fol. 345).

IV. "That the Court erred in charging the jury "that they must be satisfied that at the time when the above question was answered by Mr. Davey, he either had been addicted to the excessive or intemperate use of alcoholic stimulants or opium, or that he was at that time in the habit of the frequent or daily use of it." The court erred in useing the phrase; "or that he was at that time in the habit of the frequent or daily use of it." (Fol. 348.)

These exceptions and assignments of error seem to be mere unmeaning quibbles. Can it reasonably be pretended that if a man does use alcoholic stimulants often or daily he does not do it habitually, he is not in the habit of doing it? If he does use them often or daily, while he does so, it must be his habit, and he must do it habitually. When he ceases to do it then the habit ceases. We speak of a man's habit as being that which he is accustomed to do frequently, or that which he does often or daily.

III.

The fifth, sixth, seventh and eighth exceptions relate to the same subject matter and may be considered together.

They are found on pages 78 and 79 of the record and relate also to the charge of the Court.

The requests made to the Court to charge, and the charge of the Court, which gave rise to these exceptions, are contained on page 75 of the record. They are as follows:

"8th. The impairment of health referred to need not be a permanent impairment of health in order to avoid the policy." "The impairment of health contemplated by this condition of the policy is not necessarily permanent or irremediable, nor is it the temporary indisposition or disturbance usually resulting from a drunken debauch, but it is the development of disease or the impairment of constitutional vigor by the use of intoxicating beverages in such a degree and for such a time as is ordinarily understood to constitute intemperance."

"9th. The expression in the policy, 'became so far intemperate as to impair his health,' does not mean habitual intemperance, but an act of intemperance producing impairment of health is within the condition of the policy and renders the policy null and void, except as therein provided." "This instruction is refused, the words of the condition are to be expounded according to the common and popular acceptation of their meaning. In this sense of them a single excessive indulgence in alcoholic liquors is not intemperance, but there must be such frequency in their use, continued for a longer or shorter period, as indicates an injurious addiction to such indulgence."

The exceptions taken to this part of the charge (pages 78 and 79) are as follows:

"And the said defendant then and there also excepted to the Court's refusal to charge the jury as prayed for in the eighth request, to wit:

"The impairment of health referred to need not be a permanent impairment of health in order to avoid the policy."

And the said defendant prayed that his said exception may be sealed, and it is sealed accordingly.

JNO. T. NIXON, J. [L. S.]

And the said defendant then and there also excepted to that part of the charge of the Court, in words as follows, to wit:

"The impairment of health contemplated by this condition of the policy is not necessarily permanent or irremediable, nor is it the temporary indisposition or disturbance usually resulting from a drunken debauch, but it is the development of disease or the impairment of constitutional vigors by the use of intoxicating beverages in such a degree and for such a time as is ordinarily understood to constitute intemperance."

And said defendant prayed that his said exception may be sealed, and it is sealed accordingly.

JNO. T. NIXON, J. [L. S.]

And the said defendant then and there also excepted to the Court's refusal to charge the jury as prayed for in the ninth request, to wit:

"The expression in the policy 'became so far intemperate as to impair his health' does not mean habitual intemperance, but an act of intemperance producing impairment of health is within the condition of the policy, and renders the policy null and void except as therein provided."

And said defendant prayed that his said exception may be sealed, and it is sealed accordingly.

JNO. T. NIXON, J. [L. S.]

And the said defendant then and there also excepted to that part of the charge of the Court as is in these words, to wit:

The words of the condition are to be expounded

according to the common and popular acceptation of their meaning. "In this sense of them a single excessive indulgence in alcoholic liquors is not intemperance, but there must be such frequency in their use, continued for longer or shorter period, as indicates an injurious addiction to such indulgence."

And said defendant prayed that his said exception may be sealed, and it is sealed accordingly.

JNO. T. NIXON, J. [L. S.]

The assignments of error made upon these exceptions are upon page 81 and 82 of the record and are in the following language:

VI. That the Court erred in refusing to charge the jury as prayed for in the eighth "request" to charge, to wit:

"The impairment of health referred to need not be a permanent impairment of health in order to avoid the policy."

VII. That the Court erred in charging the jury, in answer to the eighth request, as follows:

"The impairment of health contemplated by this condition of the policy," is not necessarily permanent or irremediable, nor is it the temporary indisposition or disturbance usually resulting from a drunken debauch, but it is the developement of disease, or the impairment of constitutional vigor by the use of intoxicating beverages in such a degree and for such a time as is ordinarily understood to constitute intemperance. (Fol. 356.)

VIII. That the Court erred in refusing to charge the jury as prayed for in the ninth "request to charge," to wit:

"The expression in the policy 'become so far intemperate as to impair his health' does not mean habitual intemperance, but an act of intemperance producing impairment of health is within the condition of the policy, and renders the policy null and void, except as therein provided." (Fol. 366.)

IX. That the Court erred in charging the jury, in answer to the tenth request, as follows:

"The words of the condition are to be expounded according to the common and popular acceptation of their meaning. In this sense of them a single excessive indulgence in alcoholic liquors is not intemperance, but there must be such frequency in their use, continued for a longer or shorter period, as indicates an injurious addiction to such indulgence." (Fols. 366, 367.)

The condition of the policy to which these requests and assignments of error refer will be found on page 84 of the record.

"If he shall become so far intemperate as to impair his health, or induce delirium tremens," * * * "this policy shall be null and void."

This language is certainly not to receive a strained construction for defeating a recovery upon this policy. What, then, is the plain and natural import of the terms used? Can it with any reason be said of a man who has on a single occasion indulged excessively in the use of alcoholic stimulants that he has become intemperate—that he is an intemperate man? Yet, according to this language, in order to render the policy void, he (the man) must become intemperate, and he must become so far so as to impair his health. Now, is not the plain import of this language that if the insured shall become addicted to the use of alcoholic stimulants to such an extent as to be called intemperate, and then by reason thereof his health shall be impaired, the policy shall be void?

To become intemperate certainly means to acquire intemperate habits. The definition of "intemperate" in Webster's dictionary is "addicted to an excessive or habitual use of spirituous liquors."

One single debauch, however excessive, clearly cannot, with any reason, be said to subject a person

to the charge of being addicted to intemperate habits, or to have become intemperate.

What was said by this Court in the case of *Insurance Company v. Foley*, 105 U. S. Reports, 354, has a bearing upon this question. We quote the language of the Court:

"The charge given by the Court, as stated above, correctly presented the law of the case. The question was as to the habits of the insured. His occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an exceptional case of excess justify the application of this character to him." * * * *

"When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetitions of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one, because he was once seen on the streets in the morning before the sun had risen; nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The Court did not, therefore, err in instructing the jury that if the habits of the insured, "in the usual, ordinary, and every day routine of his life, were temperate," the representations made are not untrue, within the meaning of the policy, although he may have had an attack of delirium tremens from an exceptional over-indulgence. It could not have been contemplated from the language used in the policy that it should become void for an occasional excess by the insured, but only when such excess has by frequent repetitions become a habit."

A similar question was presented to this Court in the "*North Western Mutual Life Insurance Company v. Muskegan National Bank*," decided in May last and precisely the same views are there expressed as in the case just quoted.

IV.

The ninth, tenth, eleventh and twelfth exceptions relate to the same matter. They are found on pages 79 and 80 of the record. They are answered by the Court, together. The requests to charge, and the charge of the Court out of which they arose are as follows (pages 75–76):

"10th. If the jury find that the illness of William A. Davey at Alexandria Bay in the summer of 1881, which resulted in his death, was occasioned by the use of alcoholic liquors, the policy was null and void, except as therein provided in the 8th section."

"11th. If the jury find that the illness of William A. Davey at Alexandria Bay in the summer of 1881, which resulted in his death, was not occasioned wholly by the use of alcoholic liquors, but that the use of the same contributed to said illness, his health was impaired by said liquors and the policy is null and void, except as provided in the 8th section."

"These points are answered together: If the jury find that the illness of William A. Davey at Alexandria Bay in the summer of 1881, which resulted in his death, was caused either wholly or partially, by the intemperate use of alcoholic liquors, as explained in answer to the 9th prayer of the defendant, the policy was thereby avoided, except as therein provided in section 8th."

If the Court was correct in the interpretation of the meaning of that part of the policy just considered, referred to in the 8th and 9th exceptions, "if he shall become so far intemperate as to impair his health," &c., then clearly these last two exceptions fall to the ground. What is it possible to say more in favor of the defendant, with this understanding of the meaning of the policy, than was said by the Court in reply to these requests to charge?

V.

The thirteenth and fourteenth exceptions also pertain to the same matter, and arose out of the 12th request to charge. This request and the answer of the Court are found on page 76 of the record,

"12th. If the jury find that the said William A. Davey drank alcoholic liquors at Alexandria Bay, to the extent testified to by the witnesses for the defense, and the effect of the same was to impair his health in any degree the policy is void, except as provided in the 8th section. The jury must consider the testimony on both sides touching the habits, course of life, and condition of William A. Davey at Alexandria Bay, and if they are satisfied that they became so far intemperate, as before explained, and then indulged his injurious taste as to impair his health in any degree, the policy is void, except as provided in the 8th section."

We submit to this Court that the charge in this respect was all that could be required bythe defendent.

Will it be pretended that, if the jury believed that the insured did drink liquors at Alexandria Bay to the extent testified to by the witnesses for the defense, discarding all of the evidence on the part of the plaintiff, but that he drank it as he took any other medicine as a preventive or restorative remedy against sickness or disease, and not in gratification of a depraved taste, or in obedience to, or in the indulgence of a vicious or intemperate habit, that such an administration of it would vitiate the policy?

Yet if the Court had charged in this respect as requested by the defendent, such would have been the effect of the charge, and it would undoubtedly, have been erroneous.

What the Court said upon this point put the matter fairly and correctly before the jury.

VI.

In finally submitting the matter to the jury, the Court summarized the whole case, and put it so fairly and intelligibly that I cannot forbear to quote the language used, as a conclusion to what I desire to submit to this Court.

"Now, gentlemen, there are two questions for your consideration here, two branches of inquiry to which you must devote yourself to decide this case for the plaintiff or defendant: In the first place, was the question which I have read to you, No. 6, truthfully or untruthfully answered at the time the application was made out for this insurance? If the evidence satisfies you that before that time Mr. Davey was addicted or had been addicted to the excessive or intemperate use of any alcoholic stimulants or opium, or was he at the time in the habit of using any of these often or daily—if the evidence satisfies your conscience that the answer, his denial of his addiction to such habit or such daily or frequent use of alcoholic liquor or opium is untrue, why, it is your duty to find against the plaintiff. If you are not satisfied, however, then, so far as that ground of defence is concerned, why the defendant's case will fall."

"In the next place, you will consider the habits and course of the life of Mr. Davey after the execution and delivery of this policy of insurance. Did he become so far intemperate as to impair his health or induce delirium tremens; did he become intemperate in the sense which I have explained to you in answer to the defendant's prayer of instructions, and was his health impaired by such intemperance? If there is sufficient proof to satisfy you that this condition of the policy was broken by the habits and course of life of Mr. Davey after the execution of the policy, and his indulgence contributed to his death, then the plaintiff is not entitled to recover. As you consider the proofs on both sides touching these two branches of the case, your verdict will be for the plaintiff or defendant."